U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date Issued: June 12, 1998

Case No.: **97 INA 062**

In the Matter of:

NASA OIL CORPORATION,
Employer,

on behalf of

MARIA LUISA SAN LUIS SANCHEZ MANLAPAS,
Alien.

Appearance: D. E. Korenberg, Esq., of Encino, California.

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARIA LUISA SAN LUIS SANCHEZ MANLAPAS ("Alien") by the NASA OIL CORPORATION (the "Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

This case arises from an application for labor certification filed on May 23, 1995, by the Employer, seeking alien labor certification for the position of Bookkeeper/Full Charge on behalf of the Alien. AF 36.[3] The duties of the job were described as follows:

> Maintain records of financial transaction by use of computer to show statistics and other items pertaining to the operation of 3 gas stations, carwash and Real Estate. He/she will; analyze and reconcile accounts; verify and record details of transactions to reflect status of accounts, invoices, sales records, inventory records and requisitions; prepare and maintain records of accounts payable and receivable, trial balance, quarterly projected budget and taxes, profit and loss statements, payroll and bank reconciliation by use of Lotus 1-2-3, Excel, Windows, Paylink and Platinum Program; calculate employee's wages, withholdings, Social Security and other taxable deductions; calculate quarterly payroll taxes (940, 941 and 942) and annual returns (W2 and 1099); prepare and print monthly general ledgers; audit all invoices; cut checks on a weekly basis to vendors, utilities, etc...

Employer required that applicants have two years of experience in the job offered and experience using Lotus 1-2-3, Windows, Excel, Paylink and Platinum Program. AF 36.

Notice of Findings. The Certifying Officer issued a Notice of Findings (NOF) proposing to deny certification on April 30, 1996. The CO stated that U.S. applicant T. H. Lee appeared to be qualified for the job on the basis of his resume, and that the Employer's rejection of Mr. Lee on the basis of his alleged unavailability was not convincing because the Employer repeatedly changed the interview dates and sent a postage due letter to the applicant that discouraged him from pursuing the job. Citing 20 CFR §§ 656.21(b)(6) and 656.20 (c)(8), the CO concluded that the Employer had not recruited Mr. Lee in good faith and that it had rejected him for reasons that were neither lawful nor job related. Employer was instructed to document that it engaged in good faith recruitment of Mr. Lee at the time of initial referral and consideration of the job application of this U. S. worker.

Rebuttal. Employer submitted timely rebuttal on June 21, 1996. AF 16-20. The Employer denied that Mr. Lee's interview appointment was ever rescheduled. Included in rebuttal was Employer's declaration it sent a certified letter to Mr. Lee on November 24, 1995;

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[2] Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3] "AF" is an abbreviation for "Appeal File."

that, after realizing that the postage had not been paid, the Employer called Mr. Lee by telephone on November 27, 1995, to schedule an interview on November 29, 1995; that Mr. Lee than said he was no longer interested in the job, having found other employment. The Employer alleged that its failure to pay the postage for the letter to Mr. Lee occurred through inadvertence; that it never changed the interview date; and that when Mr. Lee was contacted by Employer by telephone on November 27, 1994, he said he was not interested in the job.

Final Determination. The CO issued a Final Determination on June 28, 1996. AF 11-15. The CO said that Mr. Lee responded to a questionnaire and to telephone inquiries in a consistent manner, stating that Employer had sent him a postage due letter, that the Employer had changed the interview date three times, and that the Employer had asked questions about whether he had found another job yet. The CO gave greater weight to Mr. Lee's statements in concluding that the Employer had not recruited U.S. workers in good faith and that it failed to demonstrate that the job was open to any qualified U.S. worker.

Appeal. Employer filed a Motion to Reconsider on July 22, 1996. AF 02-05. On July 26, 1996, the CO denied the Motion to Reconsider and referred the case to BALCA for administrative-judicial review.

Discussion

The issue is whether Employer recruited U.S. workers in good faith and whether the job opportunity was clearly open to any qualified U.S. worker. Actions by an employer which indicate a lack of good faith recruitment effort or prevent qualified U.S. workers from pursing their applications are a basis for denying certification under 20 CFR §§ 656.21(b)(6), 656.20 (c)(8), as the employer has failed to prove that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work within the meaning of 20 CFR § 656.1. Although the regulations do no explicitly state a "good faith" requirement, good faith requirement is implicit. **H.C. LaMarche Ente, Inc.**, 87 INA 607 (Oct. 27, 1988). The employer has the burden of proving by clear and convincing evidence that a *bona fide* job opportunity is available to U.S. workers and that employer has sought in good faith to fill the position with a U.S. worker. **Amger Corp.**, 87 INA 545 (Oct. 15, 1987) (*en banc*). The employer must show that U.S. applicants were rejected solely for lawful job-related reasons under 20 CFR 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker within the meaning of 20 CFR § 656.20(c)(8).

It was not questioned that Mr. Lee was fully qualified for the position that Employer offered. What the Employer did contest were the CO's findings concerning the Employer's behavior toward the qualified U. S. worker who applied for this job. In its December 6, 1995, letter to the State Employment Development Department the Employer alleged that on November 24, 1995, it had sent Mr. Lee a certified letter to invite him for an interview on November 29, 1995 (AF 45); that on November 27, 1995, the Employer "contacted Mr. Lee by telephone to confirm the set appointment" (AF 49); that Mr. Lee then said he had not received the letter and that he was no longer interested in the job (AF 49). In response to the NOF, however, the Employer later admitted that it had contacted Mr. Lee after realizing that it had sent the letter to him with insufficient postage, which was due and unpaid.

On January 15, 1996, Mr. Lee responded to the CO's questionnaire. AF 82-83. At that time Mr. Lee explained that he had refused delivery of the Employer's letter because it had been sent postage due and noted that this letter did not arrive until one day before the interview date that the Employer had scheduled. AF 46. He added that the Employer had changed that interview appointment three times, and that on each such occasion the Employer invariably asked him whether he had found other employment yet. Mr. Lee characterized Employer's conduct toward him as "very unprofessional." AF 83. When Mr. Lee was called by the CO's office on March 17,1996, he reiterated his written questionnaire responses and added that Employer had called him at unusual times as late as 8:30 p.m., and after business hours, which he felt was inappropriate. AF 33.

The record indicates that the Employer has given inconsistent information regarding its recruitment efforts. The most pointed instance is that the Employer sent a postage due letter to Mr. Lee to schedule its interview, but concealed and made no mention of this deficiency until it was revealed by Mr. Lee. Employer initially alleged that it had made a follow-up phone call to confirm the appointment it had scheduled with Mr. Lee. Not until it offered its NOF rebuttal did the Employer allege that it had made the follow-up call because the interview scheduling letter had been sent postage due. The Employer denied, moreover, that it ever rescheduled that interview.

The CO found Mr. Lee's statements more credible than Employers. We cannot say that the CO erred. Mr. Lee's statements were consistent, whereas Employer's were not . **NAP Industries, Inc.**, 94 INA 132 (Feb. 7, 1995). The panel has further considered that the Employer's letter scheduling the job interview with Mr. Lee was sent with insufficient postage. Sending a U.S. worker a letter to schedule a job interview with insufficient postage to secure its delivery in the usual order of business is clear evidence that the Employer's recruitment of U. S. workers was not conducted in good faith and that this position was not clearly open to any qualified U.S. worker. As the CO's conclusion was supported by the evidence of record, we conclude that certification was properly denied. Accordingly, the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.